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No. 195

In the Supreme Court of the United States

OCTOBER TERM, 1960

INDIAN TOWING CO., INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

GEORGE COCHRAN DOUB,
Assistant Attorney General,

ALAN S. ROSENTHAL,
DONALD H. GREEN,
Attorneys,
Department of Justice,
Washington 25, D. C.

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana (Pet. App. A, pp. 37-50) is reported at 182 F. Supp. 264. The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. B, pp. 51-55) is reported at 276 F. 2d 300.

JURISDICTION

The judgment of the Court of Appeals was entered on February 29, 1960 (Pet. App. C, p. 56). On May 19, 1960, the time for filing a petition for a writ of certiorari was extended by order of Mr.

Justice Black to and including June 30, 1960, (Pet. App. D, p. 57). The petition was filed on June 29, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below had basis for finding that the United States Coast Guard used due care in installing and maintaining a lighthouse known as Chandeleur Light.

2. Whether the courts below correctly held that, in the circumstances shown, the doctrine of *res ipsa loquitur* was inapplicable.

STATEMENT

Petitioners brought this action under the Federal Tort Claims Act to recover for property damage allegedly sustained when, on the night of September 30, 1951, the Tug NAVAJO, towing a steel barge loaded with phosphate, ran aground on Chandeleur Island off the Mississippi Coast. At the time of the grounding, Chandeleur Light was inoperative. The gravamen of the complaint was that the failure of the light was the result of negligence, and that the light failure was the proximate cause of the grounding and damage.

Following this Court's decision in *Indian Towing Co.* v. *United States*, 350 U.S. 61, holding that the complaint stated a cause of action, the case was tried on the merits. The district court found that there was no negligence upon the part of the Coast Guard

and that the damage had been proximately caused by the condition and operation of the NAVAJO. The Court of Appeals affirmed.

The facts, as found by the district court (Pet. App. A, pp. 37-50), are as follows:

Chandeleur Light is an automatically operated beacon located atop a 99 foot structure, drawing its power from a bank of storage cells totalling 32 volts. A component element of the system was a sun relay unit causing the light to function only during hours of darkness. In 1949, when the light was made automatic, its resident personnel were removed. At that time, shipping interests and the public generally were notified of the unmanned status of the lighthouse. "Local Notice to Mariners No. 107" of 1949.[1]

The NAVAJO was equipped with a radio, a radio direction finder and a standard magnetic compass, but she had no radar and her fathometer was inoperative. Although she had some navigational publications aboard, she did not carry Tide and Current Tables. At the time of the grounding, the wind was approximately 30-35 miles per hour, the visibility was up to 10 miles, and her master was at the helm. (F. 7-12, Pet. App. A, pp. 38-40.)

The court found that the master had erroneously

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[1] See, United States Coast Guard, *Light List, Atlantic and Gulf Coasts of the United States*, corrected to January 1, 1951 (C.G. 158), pp. 5, 498. This publication also advised mariners that, although lights may have a high degree of reliability, unwatched lights "may become irregular or extinguished." *Id.*, p. 5.

determined the flow of the tide and, as a result, was considerably off course. Moreover, the court found that the master was "careless, incompetent, negligent and at fault" in that he (1) placed absolute reliance on Chandeleur Light, (2) made inadequate and improper allowances for tide, wind and weather, (3) did not properly use such navigational aids as the NAVAJO did carry, (4) continued on the same course and speed even though he was no longer sure where he was, (5) continued into shallow waters without taking reliable soundings and (6) ran his vessel and her tow aground on a well known and fully charted body of land. The court found that the sole and proximate cause of the damage to the cargo and the barge itself was the unsafe, unfit, and unseaworthy condition of the tug NAVAJO and the gross carelessness, incompetence, negligence and fault of her master. (F. 22-23, Pet. App. A, p. 44,)

The district court further found that the Coast Guard had no prior notice of the failure of Chandeleur Light and that the light was immediately restored to working condition. The Coast Guard party assigned to this task found that the sun relay unit was malfunctioning. The unit was disassembled and a fine deposit with pitting was found on the contact points. The points were cleaned and adjusted and the unit reassembled and connected. The light then functioned normally. There had been no indication of failure or prior malfunctioning of the sun relay unit or any other part of the light during the entire time between installation and the grounding incident. The malfunctioning of the light was found to be the result

of the failure of the contact points, because of pitting, to complete the electrical circuit of the relay system. (F. 24-31, Pet. App. A, pp. 44-47.)

The court also found that the cause of this pitting, which had never previously occurred, was not determinable. (F. 30, Pet. App. A, p. 46). Nor was there any way in which incipient failure of the contact points could be accurately determined by disassembly of the unit and visual inspection, since some darkening and oxidation occurs in normal use and since some contacts, although pitted, may nonetheless complete the electrical circuit while continuity can be lost in others which appear on the surface to be perfectly good. The switch was reliable, with an anticipated working life without failure of from 20 to 60 years. As the district court stated, the "failure on station was an occurrence that could not have been reasonably foreseen" and the Coast Guard had used due care in making certain that the Chandeleur Light was kept in good working order (F. 31-33, Pet. App. A, p. 47).

On the basis of these findings, the district court concluded that the unseaworthiness and the negligent operation of the tug NAVAJO were the proximate cause of the damage complained of, that the Coast Guard had exercised reasonable care, and that no evidence of negligence on its part was established. Accordingly, the court granted judgment to the United States.

The Court of Appeals for the Fifth Circuit affirmed. It rejected petitioners' argument that the findings and conclusions were clearly erroneous. It also re-

jected petitioners' attempted application of the doctrine of *res ipsa loquitur*.

ARGUMENT

Both courts below have determined that the Coast Guard was not negligent in the installation or maintenance of Chandeleur Light and that the negligence and unseaworthiness of the tug NAVAJO were the proximate cause of the casualty. We submit that these determinations were fully warranted. Moreover, they are based on the particular facts disclosed by the record and do not present questions of general importance. There is no occasion for further review by this Court.

1. Petitioners contend that the issue here is "whether the failure of the lighthouse contributed to the grounding of the barge" (Pet. 5), and that "[i]n deciding this case with emphasis on the negligence of the Tug NAVAJO, the District Court and the Court of Appeals have impliedly and erroneously attributed that negligence to the barge and her cargo." (Pet. 6.) Liability under the Tort Claims Act is dependent, however, upon negligence on the part of Government employees. 28 U.S.C. 1346(b). Not only have petitioners been unable to prove such negligence but, to the contrary, the evidence established, and the courts below found, that the sole and proximate cause of accident was the negligence of the NAVAJO.

Petitioners renew their argument below on the factual question of the cause of the light's malfunctioning. Ignoring the findings of the district court,

they conclude that the cause was a lack of adequate inspection by the Coast Guard, which permitted the pitting to prevent the light from functioning (Pet. 6-22). However, the district court expressly found that "[t]he cause of this pitting, sufficient to bring about failure in this installation, which had not occurred previously and has not occurred subsequently up to the date of trial, is still not known." (F. 30 Pet. App. A, p. 46.) The court concluded that "the Coast Guard could not have reasonably anticipated the failure on October 1, 1951, of the unit from pitted contact-points, which in turn caused extinguishment of Chandeleur Light." (Pet. App. A, p. 49.) The unit had never before failed and, installed in 1949, it had an anticipated working life without failure of from 20 to 60 years. The Court of Appeals affirmed these findings (Pet. App. B, pp. 54-55).

This Court has repeatedly ruled that it will not go behind concurrent findings of the lower courts and grant further review of questions of fact, *e.g.*, *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147, rehearing denied, 340 U.S. 918; *The Germanic*, 196 U.S. 589. Petitioners present no new arguments and no persuasive reason to upset the findings below.

2. Petitioners' alternative argument is that the doctrine of *res ipsa loquitur* should have been invoked on the facts of this case. But, as petitioners themselves recognize (Pet. 24), there are two conditions precedent to the application of the doctrine: (1) the thing which has produced the injury must have been

within the complete control and management of the defendant, and (2) the occurrence must have been one which in the ordinary course of events does not happen if due care has been exercised. *San Juan Light Co.* v. *Requena*, 224 U.S. 89, 98-99; *Jesionowski* v. *Boston & Maine R. Co.*, 329 U.S. 452, 456. Neither of these conditions is present here.

The Chandeleur Light was not "the thing which caused the injury." Rather, the trial court found that the damage was occasioned solely by negligence and incompetence in the maintenance and operation of the NAVAJO (F. 34, Pet. App. A, p. 47). Although the accident might not have happened had the light been operative, its failure did not produce the injury.

Moreover, Chandeleur Light was not under such "control and management" of the United States as to bring it within the doctrine. The light is a complicated set of automatically functioning equipment, miles from the nearest Coast Guard Station. It is unmanned, difficult of access, and is not within sight of the mainland. It is subject to many forces independent of the Coast Guard.

Finally, even with proper care, a complex light can fail in the ordinary course of events. The trial court found that due care was used to keep the light in good working order (F. 33, Pet. App. A, p. 47) and that its failure was not the result of negligence. It is apparent that a complex light structure can fail even in the absence of any negligence. The Coast Guard is not under an insurer's duty to maintain perfect lighthouses; its duty is to provide reasonable mainte-

nance and inspection so as to keep navigational lights in as good working order as is reasonably possible. In its earlier decision in this case, *Indian Towing Company* v. *United States*, 350 U.S. 61, 69, this Court observed that the responsibility to maintain the light includes the duty of using due care to discover when the light becomes extinguished and to repair it or give warning (as the Coast Guard did here (Pet. App. A, pp. 44-45)). In answer to the question whether this particular failure was one which might occur in the absence of negligence, the trial court held that it was, and that the failure of the light could not have been reasonably foreseen (F. 32, Pet. App. A, p. 47). In short, the mere occurrence did not warrant an inference of negligence.

There is a further answer. Even assuming the applicability of *res ipsa loquitur* to the case at bar, the doctrine is one which serves only to shift the burden of going forward with the evidence. *Smith* v. *United States*, 96 F. 2d 976 (C.A. 5). The Government carried this burden by establishing affirmatively that due care had been exercised and that failure of Chandeleur Light could not have been reasonably foreseen.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

ALAN S. ROSENTHAL,
DONALD H. GREEN,
Attorneys.

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